On October 3, 1943, the corporation's books indicated an operating loss to that date of $59,562.91. There were small operating losses in 1944 and 1945. For 1946 the books indicated a profit of $278,196.85 before taxes. By 1947 corporate surplus exceeded a million dollars. Since November 26, 1943, and to the present time Oregon Steel has purchased large quantities of scrap from Alaska Junk. (R. 52.)

Alaska Junk's partnership return for 1942 disclosed net profits of $236,123.45, of which $64,030.86 was reported as the distributable share of Sam Schnitzer; a like amount as the share of Harry J. Wolf; and $54,030.86 as the distributable shares of each of their wives. Each of the four included such share in the income reported on his individual income tax return for 1942. Alaska Junk's partnership return for 1943 disclosed net profits of $246,055.71, of which $66,513.92 was reported as the distributable shares of Sam Schnitzer and Harry J. Wolf and $56,513.93 as the distributable shares of their wives. Each of the four included such share in the income reported on his individual income and victory tax return for 1943.[6] (R. 52-53.)

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[6] In computing the incomes of Sam Schnitzer and Harry J. Wolf for 1942 and 1943 the Commissioner denied recognition to their wives as partners but on redetermination the Tax Court below held, adversely to the Commissioner, that the wives were entitled to recognition as partners of Alaska Junk for tax purposes. (R. 56-61.) The Commissioner did not appeal to the court below from this adverse holding of the Tax Court and the partnership issue is thus not before this Court.

On the partnership's return for 1943, a deduction of $202,350.60 was claimed as a bad debt, represented by Alaska Junk's open account with the corporation. The Commissioner disallowed this deduction. (R. 53.) Instead, the Commissioner treated this amount as a loss in capital investment (R. 61), thus deductible, not in full, but at the lesser capital loss rates, under Section 117 of the Internal Revenue Code. The Tax Court sustained the Commissioner, holding that the advances were contributions to the capital of Oregon Steel and hence, their ensuing worthlessness was not a bad debt. (R. 61-70.) The deficiencies sustained by the Tax Court in federal income and victory taxes for the year 1943 in the case of each taxpayer are the result of the conclusion of this single issue in favor of the Commissioner.

On taxpayers' appeal the court below affirmed the decisions of the Tax Court upon the basis of the Tax Court's opinion (R. 562).

ARGUMENT

Petitioners' contention that the holding of the courts below confers upon the Commissioner the right, under the statute, "to convert a debt into a capital contribution" (Pet. 17-19), is without substance. The Tax Court did not, in this case, hold that the statute gave the Commissioner the right to convert a debt into a capital contribution. It merely held, after considering all of the facts and circumstances surrounding the transactions in-

volved, including contemporaneous recording entries and documents made by the parties or their representatives, that the advances made to Oregon Steel by Alaska Junk were capital contributions and not debts.[7]

Whether stockholders' advances of funds to their corporation constitute a capital contribution, or a loan, is a question of fact, and, as with all factual questions, its solution varies with and depends upon the peculiar circumstances of the individual record. *John Kelley Co.* v. *Commissioner*, 326 U. S. 521, 530; *Cohen* v. *Commissioner*, 148 F. 2d 336 (C. A. 2). Cf. *Commissioner* v. *Culbertson*, 337 U. S. 733, 742. Thus, the determination of that question in this case was primarily for the Tax Court, as the trier of the facts, whose factual findings are entitled to be treated as final "unless clearly erroneous." Internal Revenue Code, Section 1141 (a), as amended by Section 36 of the Act of June 25, 1948, c. 646, 62 Stat. 869 (26 U. S. C. 1946 ed., Supp. II, 1141); Rule 52 (a), Federal Rules of Civil Procedure.

In deciding whether or not a debtor-creditor relationship resulted from the advances, the Tax Court made careful findings (R. 38-53) after having analyzed the record, and considered *inter alia*

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[7] Treasury Regulation 111, promulgated under the Internal Revenue Code, Section 29.22(a)-16, quoted in the petition (p. 3), and relied upon by the taxpayers here (Pet. 33-34) is directed to the meaning of "gross income" under Section 22 (a), and has no relevancy to the deduction issue here involved.

the parties' intent, bookkeeping form, expectation of repayment, the relation of advances to stockholdings, and the adequacy of corporate capital previously invested. No one characteristic was regarded as decisive, but all these factors (R. 63-64), and others (R. 65-70), were taken into account and weighed by that Court. The testimony given at the hearing by interested witnesses or those friendly to taxpayers, approximately five years after the event, with respect to the intent of the partners, was conclusory in character,[8] and in weighing the evidence the Tax Court was warranted in concluding that those categorical statements were outweighed by the many contemporaneous record acts and documents (R. 40-52, 64-70), which were inconsistent with the unsupported statements of the witnesses. *United States* v. *Gypsum Co.*, 333 U. S. 364, 396, rehearing denied, 333 U. S. 869; *Greenfeld* v. *Commissioner*, 165 F. 2d 318 (C. A. 4); *Grace Bros.* v. *Commissioner*, 173 F. 2d 170 (C. A. 9); *Joe Balestrieri & Co.* v. *Commissioner*, 177 F. 2d 867 (C. A. 9). And a judge of the Tax Court heard the testimony of the witnesses and was in a position to judge their veracity and to weigh their testimony against the other evidence adduced. Consequently, the court below did not err on this record in holding that the Tax Court's factual conclusion was not

[8] See, e.g., testimony of Morris Schnitzer (R. 87, 88, 89, 104, 108, 139, 407-408); Manuel Schnitzer (R. 187); Monte L. Wolf (R. 374).

clearly erroneous.[9] *United States* v. *Gypsum Co.*, *supra*, at p. 396, *supra*; *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 340-342; *United States* v. *Real Estate Boards*, 339 U. S. 485, 495-496; Rule 52 (a), Federal Rules of Civil Procedure, *supra*.

Analysis of the record discloses that various considerations strongly support the Tax Court's factual conclusion that Alaska Junk made advances as a contribution to capital and not as a loan. No interest was charged at any time for the alleged loan despite the circumstance that Alaska Junk maintained its books on the accrual basis (R. 34), and with the exception of formal notes given on the very day that they were cancelled and on which taxpayers sold their interest in Oregon Steel to new owners (R. 50-51), no evidence of debt in any form was ever given by Oregon Steel to taxpayers. The record of undisputed acts and dealings of taxpayers from the organization of Oregon Steel until they sold their interest, during a period of approximately two and a half years, contains no contemporaneous expression by the partners of Alaska Junk or the stockholders of Oregon Steel, or others, which shows unambiguously that the balance on the open account of Alaska Junk was intended by them to be a debt. Accepted indicia of debt were absent, such as fixed maturity date for payment,

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[9] In the past, the court below has unhesitatingly exercised its authority to set aside a Tax Court finding (*Gillette's Estate* v. *Commissioner*, 182 F. 2d 1010 (C.A. 9)), where it has deemed such finding clearly erroneous.

agreement on interest rate, no subordination to creditors, divorce from management, security for payment, written evidence of indebtedness, timely and clear entry in purported creditor's books. In addition, among other criteria sustaining the Tax Court's conclusion, is the significant circumstance that this was a lending and investing transaction under which losses were matched in proportion to stockholdings and were actually so computed on taxpayers' books. (R. 51-52, 69.) The Tax Court was also warranted in considering the obviously excessive debt structure as against apparent nominal stock investment, if taxpayers' claim is to be credited. (R. 66.) *John Kelley Co.* v. *Commissioner, supra,* at p. 526; *Arnold* v. *Phillips,* 117 F. 2d 497 (C. A. 5), certiorari denied, 313 U. S. 583; *1432 Broadway Corp.* v. *Commissioner,* 4 T. C. 1158, 1164-1165, affirmed, 160 F. 2d 885 (C. A. 2). On the other hand, there were contemporary statements and acts which are plainly inconsistent with the claim that the advances were intended to constitute a debt (R. 45, 51-52).

It is clear, therefore, that the Tax Court could reasonably infer from all of the evidence adduced that the advances made by Alaska Junk to Oregon Steel were intended by the partners to be a contribution to capital and not a loan, and that the court below was correct in holding that the finding of the Tax Court was not clearly erroneous. *John Kelley Co.* v. *Commissioner,* 326 U. S., *supra,* at

p. 530; *Boehm* v. *Commissioner*, 326 U. S. 287, 294, rehearing denied, 326 U. S. 811.

No conflict exists between the decision below and the cases cited in taxpayers' petition (Pet. 24-25, 35-47), since the cited cases turned on their own peculiar facts. Taxpayers' endeavor to point to single factors in the evidence as decisive (Pet. 52-67) is unavailing. The Tax Court was entitled to weigh and did weigh all of the factors present.

Congress did not intend to grant a deduction on ambiguous transactions, subject to treatment at a taxpayer's option as debt or investment, and both of the courts below were warranted in declining to relax the strict rule of construction which has obtained in the case of claims for deduction under the Revenue Acts. *Equitable Society* v. *Commissioner*, 321 U. S. 560, 564; *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440; *Deputy* v. *duPont*, 308 U. S. 488, 493; *Brown-Rogers-Dixson Co.* v. *Commissioner*, 122 F. 2d 347, 350 (C. A. 4); *Pacific Southwest R. Co.* v. *Commissioner*, 128 F. 2d 815, 817 (C. A. 9), certiorari denied, 317 U. S. 663.

CONCLUSION

The decision of the court below is correct and no question warranting review is presented. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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DECEMBER 1950.

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